United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: February 18, 2004

TO : James J. McDermott, Regional Director
Region 31

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Howe Electric, Inc.
Case 31-CA-25419

This case was submitted for advice on whether the Employer violated Section 8(a)(1) by filing a Section 301 lawsuit against the Union seeking damages allegedly incurred as a result of a work stoppage.

Without deciding whether the lawsuit was reasonably based or filed with a retaliatory motive under either Bill Johnson's[1] or BE&K,[2] we conclude that the Employer did not violate Section 8(a)(1) because the lawsuit was not directed at protected activity.

FACTS

The Employer is an electrical subcontractor who performed work for a construction project on the Vandenberg Airforce Base in Vandenberg, California. The Union (IBEW Local 413) represented the Employer's crew of approximately 50 electricians on this project, which concluded in February 2003. This case essentially involves a dispute that arose between the parties about whether employees were on the clock or on their own time during the three minutes in the morning that it took them to get to the parking lot and into their work clothes, and the three minutes for the reverse at the end of the day.

According to the Employer, in September 2000, an employee dispatched by the Union raised an issue concerning the "reporting point" for the job: whether, by the 7:00 a.m. start time, it was sufficient for employees to arrive in the parking lot, or were they required to be in their work clothes, with tools in hand, at the trailer where assignments are handed out. The Employer was not, at the time, a signatory with the Union on this project, but it telephoned the Union office to inquire about the reporting

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[1] Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 742 (1983).

[2] BE & K Construction Co. v. NLRB, 536 U.S. 516 (2002).

point issue. The Union sent out an agent to investigate and he agreed with the Employer that the workday would begin and end at the work area. The reporting point would be the trailer; the employees would arrive and depart on their own time. The Union agent has since passed away, and the Union submitted no evidence denying the Employer's version of events.

On June 7, 2001, the Employer and the Union entered into a collective-bargaining agreement, effective until May 31, 2003. The agreement was silent about reporting points. Section 1.04 of the collective bargaining agreement provided that "There shall be no stoppage of work either by strike or lockout because of any proposed changes in this Agreement or dispute over matters relating to this Agreement." The agreement contained a grievance procedure, but it did not provide for arbitration. The parties agreed to process any grievances internally through the Labor-Management Committee and then on appeal to the Council on Industrial Relations for the Electrical Contracting Industry. Both decisional bodies have an equal number of labor and management representatives, and a decision of the Council is final and binding, even if the sides deadlock.

In September 2001, an employee again raised the reporting point issue with the Union. Union business agent Tim Bennett visited the site on September 7 to investigate the issue with the employees. Bennett learned that the employees had been arriving a few minutes early to get dressed and equipped before obtaining their assignments at 7:00 a.m., and stopped working a few minutes before the end of their shift to allow them to walk to their vehicles by 3:30 p.m. Bennett instructed the employees to start treating their vehicles as the "reporting place," meaning that they should begin their work day at their vehicles at 7:00 a.m. instead of being dressed and equipped in front of the trailer, and stop working a few minutes before 3:30 p.m. to allow themselves time to get to their vehicles.

The employees immediately began following the Union's directive to make their vehicles the reporting place, and within a few days the Employer discharged five of them. The remainder of the employees continued to treat the parking lot as the reporting point until the Employer and the Union reached an agreement, as further described below.

On September 18, 2001, the Union filed a grievance over the discharges and the reporting point issue. Both parties presented their positions to the Santa Barbara Labor-Management Committee on October 15 and the committee announced on October 25, 2001, that they had deadlocked on all issues.

On November 9, 2001, the parties presented their arguments at an Interim Meeting of the Labor-Management Committee. After hearing their arguments, both a labor and management official told the Union that it was unlikely to win its grievance since the collective-bargaining agreement contained no provision concerning reporting points. The officials added that if the parties did not reach a settlement, the committee would deadlock, and an appeal to Washington, D.C. also would likely deadlock. Based on this information, on the same date the Union and Employer negotiated a resolution to the Union's grievance. The Union conceded that the Employer had not violated the collective-bargaining agreement and agreed that the reporting point would be the trailer at 7:00 a.m., and the employees would not stop working until 3:30 p.m.

On December 14, 2001, the Employer filed a Section 301 lawsuit against the Union seeking damages stemming from the reporting point controversy. The lawsuit essentially alleged that by encouraging the employees to report to work late and stop work early from September 7 through November 9, the Union had breached the no-strike clause of the parties' collective-bargaining agreement. The Employer sought $100,000 in compensatory plus punitive damages. The Employer claims that it filed the lawsuit to recover the monetary damages it suffered due to the loss of employee work time caused by the controversy over the reporting issue. Because the collective-bargaining agreement did not provide for independent arbitration, the Employer believed a grievance to recover the monetary damages would deadlock, and that a lawsuit was the only way it could recover damages from the Union.

On April 15, 2002, the United States District Court judge presiding over the 301 action granted the Union's motion for summary judgment and, on May 10, 2002, dismissed the lawsuit. The judge based its decision on the Employer's failure to exhaust the parties' contractual grievance procedure. Following the court's dismissal of the lawsuit, on May 20, 2002, the Employer filed a grievance with the Union seeking damages of $100,296.00 for the reporting point issue. It appears that $53,626 was attributable to labor costs, and the balance to attorneys' fees and other costs of the litigation. The Union denied the grievance on May 29, 2002.

Work on the Vandenberg project ended in February 2003. On October 9, 2003, the parties executed a new collective-bargaining agreement. Section 3.01 of the agreement contains language supporting the Employer's position that the workday begins and ends at the work area, not in the parking lot.

ACTION

Without deciding whether the lawsuit was reasonably based or filed with a retaliatory motive under either Bill Johnson's or BE&K, we conclude that the Employer did not violate Section 8(a)(1) because the lawsuit was not directed at protected activity.

A threshold question in any Section 8(a)(1) case involving a lawsuit is whether the lawsuit is directed at protected activity.[3] If the lawsuit is not aimed at conduct protected by Section 7 of the Act, then it cannot be said to violate Section 8(a)(1).

We conclude that the Employer's Section 301 lawsuit was not directed at protected activity, but was instead aimed at recovering monetary damages caused by an unprotected work stoppage. The Union directed the employees to show up for work three minutes late each morning, despite the fact that the collective-bargaining agreement was silent on the issue and the undisputed past practice had been that employees would show up at the job trailer at 7:00 a.m.[4] If the Union had an honest dispute with the Employer over the proper reporting point, it could have grieved the issue to obtain clarification. Instead, the Union disagreed with the Employer's position and unilaterally directed the employees to refuse to work in order to put pressure on the Employer to change the established practice. In these circumstances, we cannot say that the work stoppage was protected.

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[3] Bill Johnson's Restaurants v. NLRB, 461 U.S. at 748-749 ("it is an enjoinable unfair labor practice to prosecute a baseless lawsuit with the intent of retaliating against an employee for the exercise of rights guaranteed by Section 7 . . .").

[4] It is undisputed that the past practice had been to arrive three minutes early in the morning to report to the job trailer at 7:00 a.m., although there appears to be some disagreement about whether the employees routinely stopped work three minutes early before proceeding to the parking lot at 3:30.

Therefore, since the lawsuit was not directed at protected activity, the Region should dismiss the charge, absent withdrawal.

B. J. K.